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Authorities Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 62.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, Fourth District.

REPLY BRIEF FOR PETITIONER.

ADDITIONAL STATEMENT OF THE CASE.

Petitioner deems it necessary to clarify certain statements in respondent's "Statement of the Case." Respondent states that when dredging operations were begun on the canal project in 1947, at a point north of Lock 27, the dredge had to "plow its way through," because the depth of the water was insufficient. This may have been the situation in 1947 when the respondent's dredge came into

the north end of the canal to dredge out the lock area, but it was not true in November of 1951, and for some time prior thereto, at which time the locks had been substantially completed.

Although, as respondent says, the canal project itself may not have been open for river traffic until February, 1953, still the locks were being operated with temporary controls prior to the date of the accident for the purpose of letting equipment in and out the lock gates (R. 57-58).

Respondent also states that the slough had never been used for trade, travel or commerce, and in his argument (p. 16) says that witness Sanders and others agreed that it had never been so used, but witness Sanders testified that in his youth he had helped take logs down the river and on the return trip they would go through Gabaret Chute, using it as a shortcut (R. 14). It had also been used by boats and barges hauling mules, coal wagons and livestock from the mainland to the island (R. 14, 79, 84, 94, 95).

Respondent says that at times Senko worked on the land driving stakes, cleaning mud from tractor treads and other similar jobs. He then argues that Senko's duties were partly on land and partly on water and were not confined to the dredge; that his duties on the dredge were intermingled with shore duties, such as shifting pipes, setting stakes on the shore and cleaning mud from the tractors (Res. Brief pp. 4, 10, 11). He bases this statement and argument on the testimony of petitioner Senko and witness Lakin (R. 127, 128, 111).

Senko was asked on cross-examination if he "sometimes" did not clean the treads on tractors, and his answer was, "That's when I was working there them four weeks; when I was filling up the fuel oil." This answer referred to a previous answer given on direct examination (page

253 of the original transcript) where he testified that in 1952, after the accident, he went back to the locks and got four weeks' work oiling tractors for respondent.

Witness Lakin, on behalf of respondent, testified on direct examination (R. 127) that at one time Senko helped him drive stakes and dig holes. He stated that this was prior to November 5th, 1951, but under cross-examination this witness did not know whether this incident occurred a month before Senko was hurt; a year before Senko was hurt or whether it was a month after Senko was hurt (R. 136); nor did this witness state that petitioner worked on and off the dredge at the time that he was doing this work for him. Prior to the accident Senko's duties were confined to the dredge except when he went ashore on dredge business (R. 15, 17, 31, 44, 46, 103, 108).

ARGUMENT.

The Dredge Was Operating on Navigable Waters of the United States.

We cannot concur with defendant that it was necessary that the dredge be "plying" in navigable waters, assuming that defendant means "plyiing" to be a movement up and down the body of water. To support his contention that the vessel must be "plying" in navigable water, he cites **Desper v. Starved Rock Ferry Co., 188 Fed. 2d 177, (7th Cir., 1951).** The court in that case pointed out that they did not interpret nor did they take any of the other cases cited to interpret the term "plying" in navigable waters to mean that the vessel must actually be in motion on navigable waters. The court said at page 181 of the opinion:

> **"The phrase plying in navigable waters is not, we believe, to be construed to mean that the vessel must at the very moment of the injury have been actually in motion upon navigable waters but is rather to be interpreted as meaning that the person injured must have been a member of the crew of a vessel which was engaged in navigation as distinguished from one which had been withdrawn from navigation."**

The authorities cited by defendant on the question of "navigability" actually support plaintiff's contention that the waters were navigable waters of the United States. From the case of **"The Daniel Ball," 10 Wall. U. S. 557, 563, 19 L. Ed. 998, at page 1001,** defendant cites the following definition of navigable waters:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or **are**

susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of travel and trade on water." (Emphasis added.)

This definition is somewhat extended by the court in **United States v. Appalachian Electric Power Company, 311 U. S. 377, at 407,** where the court added this proviso:

> **"To appraise the evidence of navigability on the natural condition of the waterway is erroneous. Its availability for navigation must also be considered."** (Emphasis added.)

The court continued to say, at page 407:

> "Natural and ordinary condition refers to volume of water, the gradients and the regularity of the flow. A waterway otherwise suitable for navigation is not barred from that classification **merely because artificial aid must make the highway suitable for use before commercial navigation may be undertaken.**" (Emphasis added.)

The court here based its determination upon the question of whether or not a particular waterway can, by the expenditure of a reasonable amount of funds by the federal government, be turned into a factually navigable stream. That this is true in the case before us now was evidenced by the testimony of A. M. Thompson, Jr., Vice President of the LaCrosse Dredging Company, that the canal project was built as a component part of a project to by-pass the Chain of Rocks reach of the Mississippi River (R. 39).

On the 1st day of November, 1951, and for many years prior thereto, Gabaret Chute, which later became known as the Chain of Rocks Canal, was in fact "Navigable waters of the United States." There was ample testi-

mony in the record to support this contention. The witness, Sanders, testified that years ago when he first started his activities as a river man, he had brought small boats through the chute on returning to Alton from St. Louis (R. 14). There was testimony by the witness, Beckman, that pleasure boats and barges hauling coal to the water works on Chouteau Island had used Gabaret Chute. There was testimony that the settlers and farmers on Gabaret Island had used a ferry to gain access to the island for themselves, their stock and their supplies (R. 95, 96, 97, 86). More currently, there was undisputed evidence that from the time of the commencing of the canal project commercial traffic moved in and out of the south mouth of the canal (R. 73, 74, 79, 80, 57, 58). Based upon these facts and upon the other evidence before the jury we feel that the verdict of the jury in determining that these waters were navigable should be sustained by the court.

It is interesting to note that Gabaret Slough had been the subject of litigation as early as 1917. The case of Weber v. City Water Company of East St. Louis and Granite City, 206 Ill. App. 417, describes the use of a ferry across the slough from Gabaret Island to the mainland. The court there said at page 418:

> "It appears from the record in this case that the Niedringhaus trustees and the appellant are the owners of an island known as Gabaret Island, consisting of about 1,840 acres, which island is formed by a slough coming out from the Mississippi River and extending around and back again into the river, and the slough is on the east, or Granite City, side of the island, and the Mississippi River on the west. The slough varies in width from one hundred to two hundred feet and is of the depth of twenty feet in places. This island is cultivated and used by the Niedringhaus trustees, except the forty acres belonging to

appellant, and its waterworks are located upon the forty-acre tract and is operated by appellant. Appellant and the Niedringhaus trustees used and operated a boat of the length of about sixty feet and the width of about forty feet with aprons of the length of about eight feet extending out at each end."

Under F. E. L. A. the Court Does Not Necessarily Decide Whether or Not the Work Is Interstate.

Respondent, in his brief (p. 19) states that this court and all courts have held uniformly that the ultimate determination of the question of interstate commerce in a F. E. L. A. case is not decided by the jury but by the court. We submit that the law in such a situation is no different than the position taken by petitioner in his brief, that is, "* * * the jury is entitled to weigh the evidence and reach their own conclusion. The resulting verdict must stand if it is supported by any probative evidence."

This very contention was raised by the Railroad Company in the case of **Southern Railway Company v. Lloyd, 239 U. S. 496.** The court said at **page 501**:

"It is insisted that the trial court should have given the instruction requested by the Railroad Company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury as given. The trial court charged that in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect."

Also see Penn. Company v. Donat, 239 U. S. 50, where this court held in a memorandum opinion that this issue was probably submitted to the jury.

Respectfully submitted,

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